U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 09 December 2004*In the Matter of:*

RAYMOND DONALD ROSE
Claimant

v. Case No. 2003-BLA-06289

GLAMORGAN COAL CORPORATION
Employer

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,

Party-In-Interest

Before: Daniel F. Solomon
Administrative Law Judge

DECISION AND ORDER - DENYING CLAIM[1]

Jurisdiction and Claim History

This case comes on a request for a hearing pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §§ 901 *et seq*. (the Act) (DX-39),[2] dated June 26, 2003.[3]

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[1] 20 C.F.R. § 725.477, 5 C.F.R. § 554-7 (Administrative Procedure Act), and also 20 C.F.R. § 725.479 Finality of decisions and orders.

(a) A decision and order shall become effective when filed in the office of the deputy commissioner (see § 725.478), and unless proceedings for suspension or setting aside of such order are instituted within 30 days of such filing, the order shall become final at the expiration of the 30th day after such filing (see § 725.481).

(b) Any party may, within 30 days after the filing of a decision and order under § 725.478, request a reconsideration of such decision and order by the administrative law judge. The procedures to be followed in the reconsideration of a decision and order shall be determined by the administrative law judge.

(c) The time for appeal to the Benefits Review Board shall be suspended during the consideration of a request for reconsideration. After the administrative law judge has issued and filed a denial of the request for reconsideration, or a revised decision and order in accordance with this part, any dissatisfied party shall have 30 days within which to institute proceedings to set aside the new decision and order or affirmance of the original decision and order.

[2] References to "CX", "DX" and "EX" refer to the exhibits of the Claimant, Director and the employer, respectively. The transcript of the hearing is cited as "Tr." and by page number.

[3] And the regulations at 20 C.F.R. Ch. VI, Subchap. B (the Regulations).

A hearing was held on May 11, 2004, in Bristol, Virginia. The Claimant is represented by Joseph Wolfe, Wolfe, Williams & Rutherford, Norton, Virginia. Glamorgan Coal Corporation (hereinafter "Employer") is represented by Timothy W. Gresham, Penn, Stuart & Eskridge, Abingdon, Virginia. An appearance was entered for the Director, OWCP, who was not represented at the hearing. The Claimant appeared at the hearing and testified. One (1) Administrative Law Judge's Exhibit, ALJ 1,[4] forty one (41) Director's exhibits, DX 1 through DX 41,[5] and six (6) Employer's exhibits, EX 1 through EX 6, were admitted into evidence.[6]

In reaching my decision, I have reviewed and considered the entire record, including all exhibits, the testimony at hearing and the arguments of the parties.

Because this subsequent claim was filed after January 20, 2001, evidence is limited subject to 20 C.F.R. § 725.414(a)(2)(2004). Parts 718 (standards for award of benefits) and 725 (procedures) of the regulations have undergone extensive revisions effective January 19, 2001. 65 Fed. Reg. 79920 *et seq*. (2000). *See also* 68 Fed. Reg. 69930-69935 (2003). The Department of Labor has taken the position that as a general rule, the revisions to Part 718 should apply to pending cases because they do not announce new rules, but rather clarify or codify existing policy. *See* 65 Fed. Reg. at 79949-79950, 79955-79956 (2000). Changes in the standards for administration of clinical tests and examinations, however, would not apply to medical evidence developed before January 19, 2001. 20 C.F.R. § 718.101(b) (2004). The United States District Court for the District of Columbia upheld the validity of the new regulations in ***National Mining Association v. Chao***, 160 F.Supp. 2d 47 (D.D.C. 2001). However, the district court's decision was affirmed in part, reversed in part, and the case remanded on appeal to the United States Court of Appeals for the District of Columbia Circuit. ***National Mining Association v. Department of Labor***, 292 F.3d 849 (D.C.Cir. 2002) (upholding most of the revised rules, finding some could be applied to pending cases, while others should be applied only prospectively, and holding that one rule empowering cost shifting from a Claimant to an employer exceeded the authority of the Department of Labor). Recently, the Benefits Review Board has upheld the evidence development provisions of 20 C.F.R. § 725.414 (2004). ***Dempsey v. Sewell Coal Co.***, 23 B.L.R. ___, BRB Nos. 03-0615 BLA/A (June 28, 2004) (*en banc*).

The Claimant filed his initial claim for benefits under the Act on November 26, 1991. (DX 1).[7] On May 20, 1992, this claim was finally denied by the District Director, who determined that Claimant failed to establish any element of entitlement, and no further action was taken by Claimant. (DX 1). Mr. Rose filed a duplicate claim for benefits on April 3, 1997. (DX 2). The claim was finally denied as abandoned by the District Director on July 22, 1997. (DX 2).

The Claimant filed the instant subsequent claim for benefits on April 6, 2001. (DX 3). After review by the District Director, a *Schedule for the Submission of Additional Evidence* was

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[4] At. Tr. 6.

[5] At Tr. 5.

[6] At Tr. 17.

[7] Director's Exhibits 1 and 2 contain all of the exhibits filed with the Claimant's first two claims.

issued on October 16, 2001. (DX 26). The District Director indicated that the Claimant would not be entitled to benefits if a decision were issued at that time. This *Schedule* followed by an amended *Schedule for the Submission of Additional Evidence* on October 22, 2001, in which the provisional opinion was that the Claimant *would* be entitled to benefits. (DX 27). Yet, on June 18, 2002, the claim was *denied* by the District Director with the issuance of a *Proposed Decision and Order -- Denial of Benefits*. (DX 33). Upon the Claimant's request for further review (DX 34), the District Director issued a *Revised Proposed Decision and Order -- Denial of Benefits* on August 11, 2002. (DX 35). The Claimant requested modification on November 7, 2002. (DX 36). This petition was denied by the District Director on June 9, 2003, with the issuance of a *Proposed Decision and Order -- Denying Request for Modification*. (DX 38). On June 26, 2003, t he Claimant requested a hearing before an administrative law judge. (DX 39). Pursuant to this request, the claim was referred to this office as previously noted.

Because Mr. Rose's most recent coal mine employment occurred at a mine located in the Commonwealth of Virginia, the rulings of the United States Court of Appeals for the Fourth Circuit control this case. ***Danko v. Director, OWCP***, 846 F.2d 366, 368, 11 B.L.R. 2-157 (6th Cir. 1988). *See* ***Broyles v. Director, OWCP***, 143 F.3d 1348, 1349, 21 B.L.R. 2-369 (10th Cir. 1998); ***Kopp v. Director, OWCP***, 877 F.2d 307, 12 B.L.R. 2-299 (4th Cir. 1989); ***Shupe v. Director, OWCP***, 12 B.L.R. 1-200 (1989) (*en banc*).

Mr. Rose testified at the hearing. He is currently disabled, having suffered a knee injury in a mining accident in 1990. (Tr. 10-11, 14). Mr. Rose last worked as a section foreman for Glamorgan Coal. In this capacity, he supervised about 11 miners. (Tr. 11, 13). He stated that he worked approximately 24 years, although only 18 years are shown in his Social Security earnings records. (Tr. 12). All of this work was underground.

The Claimant has been divorced. He is 53 years old, with a date of birth of June 8, 1951. (DX-4). He "smoke[s] an occasional cigarette[,]" but that he does not regularly do so at the present time. (Tr. 14-15). He asserted that his physical condition has changed, because he can no longer walk on account of his breathing, and said that he can't catch his breath.[8] (Tr. 15).

Issues

A miner must prove whether: (1) the miner suffers from pneumoconiosis, (2) the pneumoconiosis arose out of coal mine employment, (3) the miner is totally disabled, and (4) the miner's total disability is caused by pneumoconiosis. ***Gee v. W. G. Moore and Sons***, 9 B.L.R. 1-4 (1986) (en banc); ***Baumgartner v. Director, OWCP,*** 9 B.L.R. 1-65 (1986) (en banc). *See* ***Mullins Coal Co., Inc. of Virginia v. Director, OWCP,*** 484 U.S. 135, 141, 11 B.L.R. 2-1 (1987). The failure to prove any requisite element precludes a finding of entitlement. ***Anderson v. Valley Camp of Utah, Inc.,*** 12 B.L.R. 1-111 (1989); ***Perry v. Director, OWCP,*** 9 B.L.R. 1-1 (1986) (*en banc*).

The specific issues for adjudication in this case are:

1. Whether the evidence establishes either a mistake in determination of fact or change in condition, such that the Claimant has demonstrated a change in an applicable condition of entitlement since the final denial of his previous claim;

[8] The Claimant has also received an award, dated December 23, 1991, for pneumoconiosis from the Virginia Workmen's Compensation Commission. (DX 12).

2. Whether the medical evidence establishes that the Claimant suffers from pneumoconiosis;
3. If so, whether the Claimant's pneumoconiosis arose at least in part out of his coal mine employment;
4. Whether the Claimant suffers from a totally disabling pulmonary or respiratory impairment; and
5. Whether any total respiratory disability is caused by pneumoconiosis. 20 C.F.R. § 718.204(c).[9]

Stipulation and Withdrawal of Issues

At the hearing, employer's counsel withdrew the issue of timeliness. (Tr. 18).

Burden of Proof

"Burden of proof," as used in the this setting and under the Administrative Procedure Act[10] is that "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof." "Burden of proof" means burden of persuasion, not merely burden of production. 5 U.S.C. § 556(d).[11] The drafters of the APA used the term "burden of proof" to mean the burden of persuasion. ***Director, OWCP, Department of Labor v. Greenwich Collieries*** [***Ondecko***], 512 U.S. 267, 18 B.L.R. 2A-1 (1994).[12]

A Claimant has the general burden of establishing entitlement and the initial burden of going forward with the evidence. The obligation is to persuade the trier of fact of the truth of a proposition, not simply the burden of production, the obligation to come forward with evidence to support a claim. Therefore, the Claimant cannot rely on the Director to gather evidence. The Claimant bears the risk of non-persuasion if the evidence is found insufficient to establish a crucial element. ***Oggero v. Director, OWCP***, 7 B.L.R. 1-860 (1985).

Length of Coal Mine Employment

The length of the Claimant's qualifying coal mine employment has not been contested as an issue. I will credit Mr. Rose with greater than 18 years of coal mine employment.

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[9] The employer has challenged, *inter alia*, the validity of Secretary's amended regulations. (Tr. 18). These objections are overruled. *See, e.g.,* ***Dempsey v. Sewell Coal Co.***, 23 B.L.R. ___, BRB Nos. 03-0615 BLA/A (June 28, 2004) (*en banc*).

[10] 33 U.S.C. § 919(d) ("[N]otwithstanding any other provisions of this chapter, any hearing held under this chapter shall be conducted in accordance with [the APA]"); 5 U.S.C. § 554(c)(2). Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 901-950, is incorporated by reference into Part C of the Black Lung Act pursuant to 30 U.S.C. § 932(a).

[11] The Tenth and Eleventh Circuits held that the burden of persuasion is greater than the burden of production, ***Alabama By-Products Corp. v. Killingsworth***, 733 F.2d 1511, 6 B.L.R. 2-59 (11th Cir. 1984); ***Kaiser Steel Corp. v. Director, OWCP*** [***Sainz***], 748 F.2d 1426, 7 B.L.R. 2-84 (10th Cir. 1984). These cases arose in the context where an interim presumption is triggered, and the burden of proof shifted from a Claimant to an employer/carrier.

[12] Also known as the risk of nonpersuasion, *see* 9 J. Wigmore, **Evidence** § 2486 (J. Chadbourn rev. 1981).

Responsible Operator

Mr. Rose testified that he was last employed in mining with Glamorgan Coal. (Tr. 11). *See* (DX 4). The employer's status is not at issue. I therefore find that Glamorgan Coal Corporation is the responsible operator liable for the payment of benefits.

Medical Evidence

The following medical evidence is in the record.

X-Ray Interpretations

X-Ray Date	*Reading Date*	*Exhibit*	*Reader, Credentials*[13]	*Impression*
05-25-84	05-25-84	DX 18	Aycoth, B/BCR	1/2
05-25-84	12-18-86	DX 18	Fisher, B/BCR	1/2, quality 1
05-25-84	01-09-87	DX 18	DePonte, B/BCR	negative, quality 2
05-25-84	01-21-87	DX 18	Robinette, B	1/0, quality 2
05-25-84	01-30-87	DX 18	Bassali, B/BCR	1/1, quality 1
12-06-88	12-06-88	DX 19	Mullens	"normal chest"
01-31-92	01-31-92	DX 19	Mullens	"lungs clear"
01-31-92	02-04-92	DX 1	Robinette, B	0/1, quality 1
01-31-92	03-21-92	DX 1	Sargent, B/BCR	negative, quality 2
04-19-93	04-19-93	DX 18	Sutherland	1/2
02-06-97	02-06-97	DX 19	Mullens, BCR	"normal chest"
06-25-98	06-25-98	DX 19	Mullens, BCR	"lungs clear" "rounded soft tissue density in the inferior right hilum"
06-04-01	06-04-01	DX 16	Derderian	"chronic appearing changes in cases ... COPD" "COPD, asthma,

[13] The credentials of interpreters of the x-rays are signified as "A" for an A-reader of x-rays, "B" for a B-reader, "BCR" for a board-certified radiologist, and "B/BCR" for a radiologist who possesses dual qualifications. A physician who is "board-certified" has received certification in radiology by the American Board of Radiology or the American Osteopathic Association. 20 C.F.R. § 718.202(a)(1)(ii)(C). *See* ***Staton v. Norfolk & Western Railway Co.***, 65 F.3d 55, 57, 19 B.L.R. 2-271 (6th Cir. 1995). A "B reader" is a physician, often a radiologist, who has demonstrated proficiency in reading x-rays for pneumoconiosis by passing annually an examination established by the National Institute of Occupational Safety and Health and administered by the U.S. Department of Health and Human Services. *See* 20 C.F.R. § 718.202(a)(ii)(E); 42 C.F.R. § 37.51. Courts generally give greater weight to x-ray readings performed by "B-readers" over interpretations by physicians who possess no radiological qualification. *See* ***LaBelle Processing Company v. Swarrow***, 72 F.3d 308, 20 B.L.R. 2-76 (3d Cir. 1995). An administrative law judge may properly defer to the readings of the physicians who are both B-readers and Board-certified radiologists. ***Roberts v. Bethlehem Mines Corp.***, 8 B.L.R. 1-211 (1985). *See* ***Zeigler Coal Co. v. Director, OWCP [Hawker]***, 326 F.3d 894, 899, __ B.L.R. 2-___ (7th Cir. 2003). Finally, a radiologist's academic teaching credentials in the field of radiology are relevant to the evaluation of the weight to be assigned to that expert's conclusions. *See* ***Worhach v. Director, OWCP***, 17 B.L.R. 1-105 (1993).

				GERD"
06-04-1	08-28-01	DX 16	Sargent, B/BCR[14]	Quality 2
06-04-1	10-01-01	DX 16	Sargent, B/BCR	1/0, quality 3, "smoking history?? ?irregular opacities primarily at bases?? etiology?? compare old films. Correlate clinically. Need lateral and oblique views"
06-04-01	12-12-02	DX 17	Alexander, B/BCR[15]	1/2, quality 2
06-04-01	11-19-01	DX 19	Spitz, B/BCR[16]	negative, quality 2
06-04-01	07-29-03	EX 1	Hayes, B/BCR[17]	negative, quality 2
01-23-02	01-23-02	DX 20	Bethea	"no acute process seen"
11-12-02	11-12-02	EX 5	McReynolds	normal chest
11-17-03	11-20-03	EX 2	Wheeler, B/BCR[18]	negative, quality 1

Pulmonary Function Studies

Pulmonary function studies may provide some of the acceptable documentation for a reasoned medical opinion diagnosis of pneumoconiosis at 20 C.F.R. § 718.202(a)(4). Total disability may be established through a preponderance of qualifying pulmonary function studies. The quality standards for pulmonary function studies are located at 20 C.F.R. § 718.103 (2004) and require, in relevant part, that (1) each study be accompanied by three tracings, ***Estes v. Director, OWCP***, 7 B.L.R. 1-414 (1984), (2) the reported FEV1 and FVC or MVV values constitute the best efforts of three trials, and, (3) for claims filed after January 19, 2001, a flow-volume loop must be provided.

The administrative law judge may accord lesser weight to those studies where the miner exhibited "poor" cooperation or comprehension. ***Houchin v. Old Ben Coal Co.***, 6 B.L.R. 1-1141 (1984); ***Runco v. Director, OWCP***, 6 B.L.R. 1-945 (1984). To be qualifying, the

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[14] Dr. E. Nicholas Sargent has been a Professor of Radiology at the University of Southern California since 1967, and has been Chief of Radiology at the LAC/U.S.C. Medical Center. (DX 16).

[15] Dr. Alexander was an Assistant Professor of Radiology and Nuclear Medicine at the University of Maryland Medical System from October, 1988, until June, 1990. (DX 17). *See Worhach v. Director*, *OWCP*, 17 BLR 1-105 (1993).

[16] Dr. Spitz has been a Professor of Radiology at the University of Cincinnati since 1971. (EX 4).

[17] Dr. Hayes has been a Radiology Clinical Instructor at the West Virginia University Medical Center since 1980. (EX 1).

[18] Dr. Wheeler is board certified in radiology and is a "B reader." He has also held various academic positions in the Department of Radiology at the Johns Hopkins School of Medicine. Most recently, Dr. Wheeler has been an Associate Professor of Radiology since 1974, and prior to that an assistant professor of radiology since 1969. (EX 2).

regulations provide that the FEV1 and either the MVV or FVC values must be equal to or fall below those values listed at Appendix B for a miner of similar gender, age, and height, or the ratio of the FEV1/FVC equals 55% or less. Assessment of the pulmonary function study results is dependent on the miner's height, which has been recorded from 69 to 71 inches. I therefore find that the Claimant's height is 70 inches for purposes of evaluating the pulmonary function studies. ***Protopappas v. Director, OWCP***, 6 B.L.R. 1-221 (1983).

The following pulmonary function studies are in the record:

Date	***Exhibit***	***Physician***	***FEV1***	***FVC***	***%***	***MVV***	***Qualify***	***Ht/Age***
04-22-85	DX 19	Robinette	3.43	5.17	77%		No	71"/33

No statement of cooperation or comprehension. Tracings are attached. "Normal spirometry with normal resting ABG's."

01-31-92	DX 1	Robinette	3.17	4.45	76%	109	No	69.5"/40

Dr. Robinette observed "good" cooperation and comprehension.

06-04-01	DX 16	Derderian	1.72	2.48		50	Yes	70"/49

The Claimant's cooperation and comprehension are not noted. Tracings are attached, including a flow volume loop. Dr. John Michos reviewed this test on August 25, 2001, and pronounced it acceptable, yet not also noted "suboptimal MVV performance." (DX 16).

01-23-02	DX 20	Mitchell	1.34	1.80	74%	49	Yes	71"/50
	(post-bronchodilator)		1.46	2.15	68%		Yes	

Tracings are attached. There is no statement of cooperation or comprehension, but according to the "post-test comments" the Claimant was "unable to inhale to 90% of VC and he couldn't do breathe hold for the full 8 seconds required."

11-17-03	EX 2	McSharry	1.78	3.26	55%	73	Yes	69"/52
	(post-bronchodilator)		2.26	3.56	63%		No	

Tracings, including a flow volume loop, are attached and the Claimant cooperated "well." Dr. McSharry commented that the results of this test "appear reproducible." He further observed that the

> "[b]aseline spirometry shows moderate to severe airflow limitation with an FEV1 of 1.8 liters. Following brochodilator this improves to 2.3 liters, a 26% improvement, moving him well into the moderate obstructive lung disease range.

Dr. McSharry concluded that this test showed:

> Moderate obstructive lung disease with air trapping and reduced diffusion suggesting some degree of emphysema. There is no suggestion of restrictive lung disease demonstrated. Significant reversibility on bronchodilator testing suggests there may also be a component of asthma or other reversible obstructive lung disease.

During his deposition, Dr. McSharry testified that there were better effort results in the pre-bronchodilator trials than had been reported. (EX 6 at 11-12). I find that this study overall is a non-qualifying test, despite the qualifying pre-bronchodilator results.

Arterial Blood Gas Studies

Arterial blood gas studies may provide some of the acceptable documentation for a reasoned medical opinion diagnosis of pneumoconiosis at 20 C.F.R. § 718.202(a)(4). Total disability may also be established by qualifying blood gas studies under 20 C.F.R. § 718.204(b)(2)(ii) (2004). In order to be qualifying, the PO2 values corresponding to the PCO2 values must be equal to or less than those found at the table at Appendix C. The following blood

gas studies are in the record:

Date	*Exhibit*	*Physician*	*PCO2*	*PO2*	*Qualify*
04-22-85	DX 19	Robinette	32	88.2	No
01-31-92	DX 1	Robinette	40.1	80	No
			38.1*	87*	No
* After exercise. Altitude: "0-2999"					
06-04-01	DX 16	Derderian	37.5	71	No
			35.4*	81*	No
* After exercise. Altitude not noted, but barometric pressure noted at "756 mm hg".					
01-23-02	DX 20	Mitchell	39.8	68	No
11-17-03	EX 2	McSharry	36	84	No
			38*	63*	No
* After exercise. Testing site altitude noted at 1790 feet.					

Dr. McSharry interpreted the resting portion of this test as "normal other than for elevated caroxyhemoglobin level, suggesting recent exposure to tobacco smoke or other products of combustion." He also noted a "significant decrease in PaO2" in the exercise portion of the test, "although not within the disability range and not hazardous to the patient."

Medical Opinions and Reports

Dr. Joseph F. Smiddy forwarded a brief letter report, dated June 28, 1984, to Dr. Charles A. Fulton. He noted an initial opinion that Mr. Rose suffers from "chronic bronchitis related to his cigarette smoking and that his chest x-ray reflects primarily prominent markings secondary to chronic bronchitis." (DX 19). Dr. Smiddy is board certified in internal medicine. (EX 4).

Dr. Emory H. Robinette examined Claimant on January 31, 1992 for the Department of Labor. (DX 1). Mr. Rose provided a coal mine work history of 20-23 years, and presented a history of wheezing and frequent colds. Mr. Rose complained of a productive cough, wheezing, dyspnea and chest pain. He also told Dr. Robinette that he was then smoking, and had been doing so for 15 years at the rate of 1/2 pack per day.

On physical examination, Dr. Robinette detected scattered wheezes on auscultation. The extremities showed no clubbing or edema. Dr. Robinette diagnosed "dyspnea on exertion with chronic bronchitis," which he attributed to "? coal dust exposure, chronic cigarette consumption." As to disability, he assessed "no respiratory impairment based on spirometry or ABG."

When asked by the Department to clarify his diagnosis, Dr. Robinette stated that "[a]t this time it is my medical opinion that Mr. Rose suffers from bronchitis. This may be related to his prior cigarette consumption and coal dust exposure." (DX 1). Dr. Robinette is board certified in internal medicine and pulmonary disease, and is a B-reader. (EX 4).

Dr. J. Richard Mullens interpreted a CT Scan of the thorax on July 13, 1998. (DX 19). He interpreted the CT as "normal," and found "[n]o evidence of right hilar mass or lymphadenopathy." Dr. Mullens opined that the "[f]indings on chest x-ray were apparently due to superimposed vascular structures."

Dr. Sarkis Derderian examined the Claimant on June 4, 2001, and prepared his report for the Department of Labor. (DX 16). He recorded complaints of shortness of breath, a productive cough, chest pain, wheezing and fever/night sweats. In a narrative that accompanied the DOL report form, Dr. Derderian reported a coal mine work history of 25 years, and stated that the Claimant "is a 50-year-old gentleman, who presents with a long history of dyspnea and tobacco abuse[.]" Dr. Derderian pointed out that, despite the dyspnea and symptoms of chronic bronchitis, Mr. Rose continued to smoke and "has

accumulated over a 25 pack year smoking history." He concluded that "[g]enerally, my suspicion was that most of the radiographic findings were consistent with COPD."

On physical examination, Dr. Derderian noted hyperinflation of the lungs on inspection and percussion, with wheezing discovered on auscultation. There were no positive findings in the examination of the extremities. He diagnosed COPD, GERD and asthma, and attributed the cardiopulmonary diagnosis to tobacco abuse. As to disability, the doctor noted that the Claimant is on disability for a work related leg injury.

Dr. Derderian wrote employer's counsel in a follow-up letter, dated March 19, 2002, in order to address certain concerns. (DX 21). He opined that the most likely cause of the Claimant's respiratory impairment was his continued exposure to cigarette smoke, specifically stating that "Mr. Rose's respiratory impairment is what one might expect from history of chronic tobacco use." He further explained that the "impairment that is observed on the pulmonary function tests dating back to June of 2001 are what one would expect from a person with a long history of tobacco abuse."

Dr. Derderian pointed out that pneumoconiosis secondary to coal dust exposure "may be a slowly progressive process ... [with the] impairment ... not ... realized until well after the exposure." In the end, however, he concluded that "I would have to agree that progressive pulmonary dysfunction in this situation would be most likely related to his progressive tobacco abuse. This would be supported further by the radiographic interpretations by the radiologist Dr. Harold Spitz." (DX 21).

Dr. Roger J. McSharry conducted a physical examination of the Claimant on November 17, 2003, administered numerous clinical tests, and also reviewed Mr. Rose's medical records. He presented his report of this consultation on December 3, 2003. (EX 2).

Dr. McSharry recorded a detailed review of the tasks involved in the Claimant's coal mine employment. Mr. Rose told him that his last work was as a section foreman with responsibility for 11 miners. He was still required to operate a roof-bolter and continuous mining machine, and would often have to spread rock dust from 50 pound bags, pull cables, and carry loads of belts, doing these heavy tasks at least three hours per day.

Mr. Rose told the doctor that he had smoked for 30 years at the rate of one to two cigarettes per day, a habit that he continues. The Claimant complained of severe shortness of breath, somewhat variable at rest, and said that he can walk less than 100 yards at any one time. He is also precluded by shortness of breath from climbing hills or stairs. He requires two to three minutes to recover from this exertion to catch his breath. Dr. McSharry also recorded complaints of an occasional a non-productive cough and occasional wheezing. He also noted complaints of occasional orthopnea and nocturnal shortness of breath. Among the Claimant's medications are Advair and Combivent, which "help his breathing."

On physical examination, Dr. McSharry observed that "[c]hest exclursions are normal." The Claimant's extremities were "without clubbing, cyanosis, or edema." Based on this examination, review of records and clinical tests, including pulmonary function and arterial blood gas studies, as well as a treadmill test and the interpretation of a chest x-ray, the doctor's impression was:

1. 24 years of underground coal mining with significant exposure to coal dust.
2. Severe and somewhat variable dyspnea suggestive of reversible obstructive lung disease.
3. Modest smoking history.
4. Knee pain and injury.
5. Low back pain.

Dr. McSharry articulated more detailed conclusions in a cover letter:

> 1. There is insufficient objective evidence to justify a diagnosis of coal worker's pneumoconiosis in this patient. The chest radiographs do not demonstrate changes of pneumoconiosis. Additionally, pulmonary function tests do not have the typical appearance of symptomatic coal worker's pneumoconiosis.
>
> 2. Mr. Rose does have respiratory impairment that I would classify as moderate obstructive lung disease suggestive of emphysema. It is not disabling but will cause shortness of breath with his heaviest exertion. He also has some reversible airway disease (asthma). Any respiratory impairment present is not due to coal dust exposure. The irreversible obstruction is in

all likelihood due to cigarette smoking, which may be significantly more than was volunteered in his history.

3. He does not have a disabling lung disease in my opinion. If it were deemed disabling by others, the cause for the disability could not be attributed to his employment history but rather to smoking as well as asthma. I believe he would suffer the same respiratory impairment had he never set foot in a coal mine.

4. My opinion would not be changed were his chest radiograph read as showing pneumoconiosis.

(EX 2). Dr. McSharry is board certified in internal medicine, pulmonary medicine, and critical care medicine.

Dr. McSharry also testified at deposition, which was recorded on May 6, 2004. (EX 6). He related that the Claimant stopped working in 1991 due to a knee injury. Id. at 5. Turning to the Claimant's smoking habit, Dr. McSharry testified that the carboxyhemoglobin level was 6.2 percent. He continued:

> 6.2 percent. And I'd say in most people who are smokers of normal amounts of cigarettes, a pack or two a day, that would be a little bit high as a level. So it made me wonder whether he, in fact, might be smoking more than a couple of cigarettes a day and more on the order of a pack or two a day.

Id. at 6. Dr. McSharry elaborated on his review of the Claimant's medical records. He noted that, at the time Dr. Robinette had examined the Claimant in 1992, shortly after Mr. Rose left the mines, there were complaints of symptoms of bronchitis and a productive cough. Dr. McSharry stated that chronic bronchitis related to dust exposure is "fairly common," which "seems to go away as the years go on." Id. at 9.

The doctor reported that the physical examination was unremarkable as far as the lungs. The breath sounds were "normal." With respect to the ventilatory test, Dr. McSharry thought that the testing laboratory had reported the worst, as opposed to the best, result in the pre-bronchodilator test, and that, while a better result in one of the trials was not "reproducible," it showed what Mr. Rose "may be capable of." Id. at 11-12. He also commented on his review of prior pulmonary function testing, noting the drop in results in 2001 and 2002. But the more recent ventilatory test results showed an improvement, and counsel inquired:

> [COUNSEL] And, Doctor, would [the fact that the 2003 results exceeded earlier results] be consistent with an impairment due to coal dust exposure[?]
>
> [Dr. McSHARRY] No, climbing back up wouldn't be related to that, the trough part. That fact that lung testing could worsen over time certainly could be accounted for by pneumoconiosis, but improvements over time would not be expected.

(EX at 16). He also opined that smoking would not produce this variability either, and thought that the Claimant might have asthma. He noted that that the breathing medications that are taken by the Claimant, Advair and Combivent, are routinely prescribed to treat asthma, and, to a lesser extent, chronic bronchitis. Id. at 17.

Dr. McSharry commented that Mr. Rose walked for over eight minutes on the exercise treadmill, getting to a "seven percent grade which is more than many of the patients that I exercise get to." He walked further than one hundred yards, "and uphill for a lot of that." Id. at 17-18.

Dr. McSharry opined that the Claimant does not suffer from pneumoconiosis. When asked whether Mr. Rose has a lung disease that is either related to or aggravated by coal dust exposure, he opined that the Claimant does have a respiratory impairment and a lung disease, but that it is not related to his employment or coal dust exposure. Id. at 20. He thought that smoking was the most likely cause. Id.

On cross-examination, Dr. McSharry testified that a miner could have pneumoconiosis that does not show up on an x-ray, and also acknowledged that coal dust exposure can cause chronic airway obstruction. (EX 6 at 24). As to the carboxyhemoglobin level, he could not rule out as a fact that the level detected on the blood gas test might be the result of consuming a single cigarette just prior to the

test, but reiterated that, in his judgment, it would not. Id. at 26. He was also asked by Claimant's counsel whether simple pneumoconiosis can be disabling:

> Simple pneumoconiosis is an x-ray finding and by itself is not either disabling or nondisabling. The abnormalities of lung function that can be associated with it are or are not. And I think there is rare cases of severe obstructive lung disease related to coal workers' pneumoconiosis that radiographically show simple pneumoconiosis. So it can be, but the abnormalities associated with it can be. The x-ray itself really doesn't tell you anything about disability in the setting of simple coal workers' pneumoconiosis.
>
> * * *
>
> The patients who have simple coal workers; pneumoconiosis on x-ray which is what the definition diagnosis is can, yes, can rarely have severe obstruction related to coal dust exposure that can be disabling.

(EX 6 at 28-29). On redirect examination he emphasized that, given a positive chest x-ray in this case, while he would diagnose pneumoconiosis, that diagnosis in this instance would not alter his opinion that the Claimant's impairment was due to cigarette smoking. Id. at 29-20.

Discussion

This claim involves a modification of a subsequent claim. By requesting modification of the denial of this subsequent claim, the Claimant is entitled to a de novo review of the subsequent claim record, that is, evidence developed subsequent to the final denial of his previous claim. By showing either a change in condition or mistake in determination of fact on modification, the Claimant would then establish a change in an applicable condition of entitlement so as to merit an adjudication of his claim in light of the administrative record as a whole. The traditional notions of res judicata do not govern Section 22 modification proceedings, which may be brought whenever changed conditions or a mistake in a determination of fact makes such modification desirable in order to render justice under the Act.19 See ***Betty B Coal Co. v. Director, OWCP [Stanley]***, 194 F.3d 491, 497-98, 22 B.L.R. 2-1 (4th Cir. 1999); ***Jessee v. Director, OWCP***, 5 F.3d 723, 725, 18 B.L.R. 2-290 (4th Cir. 1993). I will therefore reexamine the subsequent claim evidence de novo to determine whether Claimant has established the threshold requirements for modification, and thus meet the requirements of Section 725.309(d). If so, the claim will be reviewed on the merits based on the record as a whole.

"Material Change in Conditions"

After the expiration of one year from the denial of the previous claim, a subsequent claim must be denied on the basis of the prior denial unless a Claimant demonstrates with the submission of additional material that one of the applicable conditions of entitlement has changed since the date upon which the order denying the prior claim became final. 20 C.F.R. § 725.309(d)(2004).

To assess whether this change is established, the administrative law judge must consider all of the new evidence, favorable and unfavorable, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him.20 ***Lisa Lee Mines***

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[19] Strictly speaking, the "mistake" analysis under Section 22 is not intended to correct "error" by a prior adjudicator. The introduction of new evidence, while not proving a change in condition, may show that a prior finding is now "mistaken" when judged in light of a new record.

[20] The Claimant's second claim was denied as abandoned. The last adjudication on the merits involved Mr. Rose's first claim, which was denied in 1992. The Secretary's regulations provide that "[f]or purposes of § 725.309, a

v. Director, OWCP [Rutter], 86 F.3d 1358, 1362, 20 B.L.R. 2-227 (4th Cir. 1996) (en banc), cert. denied, 519 U.S. 1090 (1997). The Board has ruled that the focus of the material change standard is on specific findings made against the miner in the prior claim; an element of entitlement which the prior administrative law judge did not explicitly address in the denial of the prior claim does not constitute an element of entitlement "previously adjudicated against a Claimant." See ***Allen v. Mead Corp***., 22 BLR 1-63 (2000) (en banc). If a Claimant establishes the existence of that element, he has demonstrated, as a matter of law, a change in the applicable conditions of entitlement in a subsequent claim, and would then be entitled to a full adjudication of his claim based on the record as a whole.21 ***Tennessee Consolidated Coal Co. v. Kirk***, 264 F.3d 602, 608, 22 B.L.R. 2-288 (6th Cir. 2001); ***Cline v. Westmoreland Coal Co***., 21 B.L.R. 1-69 (1997).

In this case, the previous claim was denied by the District Director because Claimant failed to establish any element of entitlement. These elements of entitlement will be addressed as follows.

Pneumoconiosis

Under the Act, to receive benefits, a Claimant must prove several facts by a preponderance of the evidence. First, the coal miner must establish the presence of pneumoconiosis.22

Pneumoconiosis under the Act is defined as both clinical pneumoconiosis and/or any respiratory or pulmonary condition significantly related to or significantly aggravated by coal dust exposure:

For the purpose of the Act, "pneumoconiosis" means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, progressive massive fibrosis, silicosis or silico-tuberculosis, arising out of coal mine employment. For purposes of this definition, a disease "arising out of coal mine employment" includes any chronic pulmonary disease resulting in respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.

20 C.F.R. § 718.201. The "legal" definition of pneumoconiosis "'encompasses a wider range of afflictions than does the more restrictive medical definition of pneumoconiosis.'" ***Cornett v. Benham Coal Co***., 227 F.3d 569, 576, 22 B.L.R. 2-107 (6th Cir. 2000) (quoting ***Kline v. Director, OWCP***, 877 F.2d 1175, 1178, 12 B.L.R. 2-346 (3d Cir. 1989)). See ***Richardson v. Director, OWCP***, 94 F.3d 164, 21 B.L.R. 2-373 (4th Cir. 1996); ***Warth v. Southern Ohio Coal Co***., 60 F.3d 173, 19 B.L.R. 2-265 (4th Cir. 1995). Certainly, an obstructive lung disease may constitute pneumoconiosis under the Act, provided it is proven to have been significantly related

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denial by reason of abandonment shall be deemed a finding that the claimant has not established any applicable condition of entitlement." 20 C.F.R. § 725.409(c)(2004). Although the record evidence is set forth herein, the subsequent claim analysis involves the consideration of that medical evidence developed subsequent to the final denial of the second claim on July 22, 1997.

[21] As a practical matter, the "subsequent claim" and "modification" analyses may effectively be the same to the extent that the adjudicator examines the entire subsequent claim record *de novo*.

[22] 20 C.F.R. § 718.201.

to or substantially aggravated by Claimant's coal mine dust exposure. See ***Stiltner v. Island Creek Coal Co***., 86 F.3d 337, 341, 20 B.L.R. 2-246 (4th Cir. 1996); see generally 65 Fed. Reg. 79943 (Dec. 20, 2000) (citing cases).

Note that the definition appears to combine the first two elements of entitlement, pneumoconiosis and cause of pneumoconiosis. However, the Claimant bears the burden of establishing both that he or she has pneumoconiosis and that the pneumoconiosis arose out of coal mine employment.

There are four methods for determining the existence of pneumoconiosis:

(1) Under 20 C.F.R. § 718.202(a)(1), a finding that pneumoconiosis exists may be based upon x-ray evidence.

(2) Under § 718.202(a)(2), a determination that pneumoconiosis is present may be based, in the case of a living miner, upon biopsy evidence.

(3) Section 718.202(a)(3) provides that pneumoconiosis may be established if any one of several cited presumptions are found to be applicable. In this case, the presumption of § 718.304 does not apply because there is no evidence in the record of complicated pneumoconiosis; § 718.305 is not applicable to claims filed after January 1, 1982. Finally, the presumption of § 718.306 is applicable only in a survivor's claim filed prior to June 30, 1982.

(4) The fourth and final way in which it is possible to establish the existence of pneumoconiosis under § 718.202 is set forth in subsection (a)(4) which provides in pertinent part:

> A determination of the existence of pneumoconiosis may also be made if a physician, exercising sound medical judgment, notwithstanding a negative x-ray, finds that the miner suffers or suffered from pneumoconiosis as defined in § 718.201. Any such finding shall be based on electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories. Such a finding shall be supported by a reasoned medical opinion. 20 C.F.R. § 718.202(a)(4).

This case arises within the territorial jurisdiction of the Fourth Circuit. Thus, absent contrary evidence, while evidence relevant to any of the above categories may demonstrate the existence of pneumoconiosis, the adjudicator, in the final analysis, must weigh all of the evidence together in reaching a finding as to whether a miner has established that he has pneumoconiosis. ***Island Creek Coal Co. v. Compton***, 211 F.3d 203, 211, 22 B.L.R. 2-162 (4th Cir. 2000); ***Penn Allegheny Coal Co. v. Williams***, 114 F.3d 22, 21 B.L.R. 2-104 (3rd Cir. 1997).

There is no evidence relevant to § 718.202 (a)(2). Accordingly, the Claimant can not establish the existence of pneumoconiosis under this section. Further, none of the enumerated presumptions apply in this case under § 718.202(a)(3). I will therefore turn to the x-ray and medical opinion evidence to determine whether the Claimant has established the presence of pneumoconiosis under either provision for purposes of this subsequent claim.

There are seven interpretations of the two chest x-rays that will be considered at Section 718.202(a)(1).[23] I find that these films present an equally probative conflict as to the existence of pneumoconiosis.

[23] The June 4, 2001 x-ray was initially provided under the Director's obligation to conduct a complete pulmonary evaluation. The numerous rereadings of this film have been developed by the other parties pursuant to their right to develop affirmative and rebuttal evidence at Sections 725.414(a)(2) and 725.414(a)(3). The x-ray taken on November 17, 2003, was proffered by the employer pursuant to Section 725.414(a)(3)(i). There are no other

There are conflicting interpretations of the June 4, 2001, chest x-ray. Drs. Sargent and Alexander respectively read this film as 1/0 and 1/2. These positive interpretations are matched by two negative readings from Drs. Spitz and Hayes. These radiologists are all dually qualified as both board certified radiologists and B-readers. Dr. Sargent possesses impressive academic credentials, having taught radiology at the University of Southern California since 1967. (DX 16). Dr. Alexander also has experience in teaching as an Assistant Professor of Radiology and Nuclear Medicine at the University of Maryland. Both of employer's experts who provided contrary rereadings of this film also have academic experience, with Dr. Spitz also holding a long-term position. Although I am concerned about Dr. Sargent's different views as to the quality of the June 4, 2001, film in his two separate readings thereof, I find that, deferring to Dr. Sargent's credentials, the Claimant has proven that this x-ray is positive on this record. See ***Worhach v. Director, OWCP***, 17 B.L.R. 1-105 (1993).

The second film, taken on November 17, 2003, and interpreted as negative by Dr. Wheeler, constitutes a negative x-ray. Dr. Wheeler holds impressive academic credentials. (EX 4). Because, at best, the subsequent claim x-rays are equally matched, I am unable to find that the Claimant has demonstrated pneumoconiosis at Section 718.202(a)(1), given his burden of proof. See ***Director, OWCP, Department of Labor v. Greenwich Collieries*** [Ondecko].

Turning to the medical opinion evidence at section 718.202(a)(4), I also find that Claimant has not demonstrated on the basis of this evidence that he suffers from pneumoconiosis, or any pulmonary or respiratory impairment significantly related to, or substantially aggravated by, his coal mine dust exposure. The medical opinion evidence that is relevant to the subsequent claim consists of the CT Scan report from Dr. Mullens, and the reports of Drs. Derderian and McSharry. None of these physicians diagnosed pneumoconiosis or any pulmonary or respiratory impairment significantly related to, or substantially aggravated by, coal mine dust exposure. The CT Scan was deemed by Dr. Mullens to be normal. Dr. Derderian attributed the Claimant's chronic obstructive pulmonary disease to his continuing smoking. Although he expressed some uncertainty, he does not offer a forthright opinion ascribing the Claimant's chronic obstructive pulmonary disease to coal mine dust exposure. Similarly, Dr. McSharry attributed Mr. Rose's pulmonary or respiratory impairment to smoking and asthma.

The medical opinion evidence does not present even a close question. Dr. McSharry's report is exceptionally thorough, and his conclusions were presented in extensively documented reasoned report, and tested on cross-examination at his deposition. In assessing the probative value of the medical opinions, I have accounted for "the qualifications of the respective physicians, the explanation of their medical opinions, the documentation underlying their medical judgments, and the sophistication and bases of their diagnoses." ***Sterling Smokeless Coal Co. v. Akers***, 131 F.3d 438, 441, 21 B.L.R. 2-269 (4th Cir. 1997). See ***Underwood v. Elkay Mining, Inc.***, 105 F.3d 946, 950-951, 21 B.L.R. 2-23 (4th Cir. 1997). Of considerable importance is the adequacy of their explanations and the thoroughness of their respective medical reports and conclusions. See generally, ***Clark v. Karst-Robbins Corp***., 12 B.L.R. 1-149 (1989)(en banc); ***Lucostic v. United States Steel Corp***., 8 B.L.R. 1-46 (1985). Although all of the medical reports presented for the subsequent claim are thorough, documented and reasoned, I will defer in the final analysis to the conclusions presented by Dr. McSharry, as buttressed by those of Dr. Derderian and the CT Scan result, and find that the Claimant has failed to

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classified x-rays developed since the final denial of the Claimant's previous claim. I have noted the x-rays taken on January 23 and November 12, 2002, but will not weigh them at Section 718.202(a)(1). *See* 20 C.F.R. § 718.102(b).

demonstrate pneumoconiosis at Section 718.202(a)(4) on the basis of medical opinion evidence.[24]

Finally, upon review of all relevant evidence at Section 718.202(a) pursuant to ***Compton***, I find that the Claimant has failed to establish pneumoconiosis for this subsequent claim. Either separately under each subsection, or combined, the evidence does not establish the existence of pneumoconiosis. In sum, I find that the Claimant does not prove a change in this condition of entitlement for this subsequent claim.

Total Respiratory Disability

The second means by which Claimant could establish a change in an applicable condition of entitlement is by establishing total respiratory disability. Section 718.204(b) defines "total disability" as follows:

> A miner shall be considered totally disabled if ... pneumoconiosis as defined in § 718.201 prevents or prevented the miner:
> (1) From performing his or her usual coal mine work; and (2) From engaging in gainful employment in the immediate area of his or her residence requiring the skills or abilities comparable to those of any employment in a mine or mines in which he or she previously engaged with some regularity over a substantial period of time.

The regulations at Section 718.204(b) provide the following five methods to establish total disability:

> (1) pulmonary function (ventilatory) studies; (2) blood gas studies; (3) evidence of cor pulmonale; (4) reasoned medical opinions; and (5) in limited circumstances, lay testimony. 20 C.F.R. § 718.204(b).

I note that any loss in lung function may qualify as a total respiratory disability under Section 718.204(b)(2). See ***Carson v. Westmoreland Coal Co.,*** 19 B.L.R. 1-16 (1964), modified on recon. 20 B.L.R. 1-64 (1996).

Initially, I find that the Claimant has not demonstrated total respiratory disability at Section 718.204(b)(2)(iii), because the record does not show the presence of cor pulmonale with right sided congestive heart failure. I also find that the Claimant has not demonstrated total respiratory disability on the basis of arterial blood gas testing at Section 718.204(b)(2)(ii). The results of three tests are in the subsequent claim record. Not one study has yielded results that qualify for total respiratory disability under the Secretary's regulations.

I do find that the Claimant demonstrates total respiratory disability on the basis of the pulmonary function study evidence at Section 718.204(b)(2)(i). Although Dr. McSharry's test has been deemed to be non-qualifying, I will credit the qualifying tests recorded by Dr. Derderian and Mitchell for purposes of Section 718.204(b)(2)(i). I note that Dr. Mitchell does not provide a statement of cooperation or comprehension. See 20 C.F.R. § 718.103(b)(5). I nevertheless find that this test is in substantial compliance with the applicable regulations, because of comments that reflect the adequacy of the Claimant's performance on this test.

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[24] Dr. McSharry also reviewed other medical records, giving him a better perspective that supports his overall conclusions. *Cf.* ***Balsavage v. Director, OWCP***, 295 F.3d 390, 397, 22 B.L.R. 2-386 (3d Cir. 2002) (opinion of physician who did not address other medical records accorded less weight). I note as well that he accounted for the possibility of a positive x-ray in rendering his disability causation opinion. I have also considered at Section 718.202(a)(4) those unclassified x-ray readings of "normal," "clear" lungs or no acute process.

The last method by which the Claimant may demonstrate total respiratory disability is by a documented and reasoned medical opinion of total disability. 20 C.F.R. § 718.204(b)(2)(iv). In this regard, I also find that Claimant has not demonstrated total respiratory disability on the basis of medical opinion evidence. I rely on the thorough and extensive medical report and conclusions rendered by Dr. McSharry, who, after a physical examination, clinical testing, and review of other records, concluded that, while he would experience shortness of breath, the Claimant does not suffer from a total respiratory disability. He accounted for the qualifying results of the ventilatory tests that were administered in 2001 and 2002, but noted that his testing depicted a rise in testing values. He observed the Claimant's performance on a treadmill protocol, and noted that the performance apparently exceeded the Claimant's expectations.

All in all, Dr. McSharry's disability opinion is the most extensively documented and reasoned. Moreover, although the conclusions rendered by Dr. Derderian as to this issue are far less specific, they do not conflict with Dr. McSharry's assessment.

Although Claimant's subjective complaints that were presented to them could support a total disability assessment, the objective findings by Dr. McSharry on physical examination and clinical testing are persuasive indications that the Claimant suffers from a totally disabling pulmonary or respiratory impairment. I find that the extensively documented medical from Dr. McSharry is sufficient to preclude a finding that Claimant would demonstrate total respiratory disability at section 718.204(b)(2)(iv). See ***Clark v. Karst-Robbins Corp***., 12 B.L.R. 1-149 (1989)(en banc); ***Lucostic v. United States Steel Corp***., 8 B.L.R. 1-46 (1985).

I therefore find that the Claimant has failed to demonstrate total respiratory disability at § 718.204(b)(2)(iv). I have considered Mr. Rose's sincere testimony about his physical limitations. Without corroborating, credible, medical evidence, however, his testimony cannot support a finding of total respiratory disability. ***Madden v. Gopher Mining Co***., 21 B.L.R. 1-122 (1999). See also, ***Fife v. Director, OWCP***, 888 F.2d 365, 370, 13 B.L.R. 2-109 (6th Cir. 1989).

Finally, after independently weighing all relevant evidence pursuant to 20 C.F.R. § 718.204(b)(2), like and unlike, including lay testimony, and considering the heavy exertional requirements of Mr. Rose's last coal mine work, which entailed not only supervision but lifting and the performance of the tasks of a continuous miner operator and roof-bolter, I nevertheless find that Claimant has not established total respiratory disability on the basis of the newly submitted evidence on this subsequent claim. See ***Fields v. Island Creek Coal Co***., 10 B.L.R. 1-19 (1987); ***Shedlock v. Bethlehem Mines Corp***., 9 B.L.R. 1-195 (1986), aff'd on recon. en banc., 9 B.L.R. 1-236 (1987).

In the final analysis, while the Claimant has demonstrated total respiratory disability at Section 718.204(b)(2)(i), I find that the arterial blood gas results and the conflicting opinions of Dr. McSharry constitute contrary probative evidence that precludes Claimant from establishing total respiratory disability.25 Claimant does not prove a change in this condition of entitlement.

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[25] I also find that Claimant would not prevail based on the record as a whole, even if he had established any applicable condition of entitlement. I have reviewed the entire record, including the fact that Mr. Rose has received an award under the Virginia Workmens' Compensation statute, and would credit the more recent evidence with respect to the nature and extent of any respiratory disability as more probative, especially evidence of the extent of any disability at the time of the hearing. *See* ***Cooley v. Island Creek Coal Co.***, 845 F.2d 622, 624, 11 B.L.R. 2-147 (6th Cir. 1988); *see also* ***Coffey v. Director, OWCP***, 5 B.L.R. 1-104 (1982). Second, while I would find that the Claimant may demonstrate pneumoconiosis on the basis of x-ray evidence at Section 718.202(a)(1), given the positive readings of early x-rays, I would also find that the record as a whole does not establish pneumoconiosis.

CONCLUSION

Based on the above, and reviewing the subsequent claim records as a whole, see generally ***Nataloni v. Director, OWCP***, 17 B.L.R. 1-82 (1993); ***Kovac v. BCNR Mining Corp***., 14 B.L.R. 1-156 (1990), modified on recon., 16 B.L.R. 1-71 (1992); see also ***Kingery v. Hunt Branch Coal Co***., 19 B.L.R. 1-6 (1994), I find that the Claimant has not proven, on the basis of the evidence developed subsequent to the denial of his previous claim, that the denial of that claim was mistaken, or that the evidence demonstrates a change in his physical condition. 20 C.F.R. § 725.310. Given this "modification" analysis, I further find that the Claimant has failed to prove a change in any applicable condition of entitlement. I therefore conclude that this subsequent claim must be denied, 20 C.F.R. § 725.309(d), and that the Claimant has failed to establish entitlement to benefits under the Act.

Attorney's Fees

The award of an attorney's fee under the Act is permitted only in cases in which Claimant is found entitled to benefits. Since benefits are not awarded in this case, the Act prohibits the charging of attorney's fees to the Claimant for representation services rendered in pursuit of the claim.

ORDER

It is hereby ordered that the claim of Raymond D. Rose is denied.

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DANIEL F. SOLOMON
Administrative Law Judge

Washington, D.C.

See ***Compton***. Moreover, I find that, on the basis of the entire record, the Claimant would not establish disability causation at Section 718.204(c). I refer again to Dr. McSharry's steadfast opinion that any pulmonary or respiratory impairment would be due to the Claimant's cigarette smoking, notwithstanding a positive x-ray. *Cf.* ***Grigg v. Director, OWCP***, 28 F.3d 416, 18 B.L.R. 2-299 (4th Cir. 1994). I have carefully reviewed Dr. McSharry's responses to cross-examination and redirect questioning regarding the question of whether simple pneumoconiosis can be disabling. Because I find that he does not *rule out* this possibility, I find that his disability causation opinion is not based on an incorrect assumption about the legal nature of that disease. I note as well that Dr. McSharry accounts for high carboxyhemoglobin levels in the Claimant's arterial blood gas testing. Finally, Dr. McSharry's disability assessment is particularly well documented. He engages in an extensive review of the Claimant's coal mine employment tasks, and details Mr. Rose's treadmill performance. *See* ***Akers***.

Alternatively, even assuming that the Claimant established pneumoconiosis, I would find that he does not suffer from a loss of lung function, regardless of etiology, that qualifies as a totally disabling pulmonary or respiratory disability under the Act. And, assuming that, I find that he would not establish disability causation.

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within thirty (30) days from the date of this Decision and Order by filing a Notice of Appeal with the Benefits Review Board at P.O. Box 37601, Washington, D.C. 20013-7601. A copy of this notice of appeal must also be served on Donald S. Shire, Esquire, Associate Solicitor for Black Lung Benefits, Room N-2117, 200 Constitution Avenue, N.W., Washington, D.C. 20210.